TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1966

No. 637

NORTHEASTERN PENNSYLVANIA NATIONAL BANK & TRUST COMPANY, ETC., PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 7, 1966
CERTIORARI GRANTED DECEMBER 5, 1966

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., DECEMBER 28, 1966

[fol. A]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,249

NORTHEASTERN PENNSYLVANIA NATIONAL BANK & TRUST COMPANY, EXECUTOR UNDER THE WILL OF CLARENCE C. YOUNG,

v.

UNITED STATES OF AMERICA, Appellant.

On Appeal from the Order of the United States District Court for the Middle District of Pennsylvania.

Appendix to the Brief for the Appellant

[fol. 3]

IN THE UNITED STATES DISTRICT COURT

DOCKET ENTRIES

Date	*Proceedings*
1963	
Jan. 28,	Complaint and demand for jury trial.
Jan. 28,	Summons issued returnable 60 days after service. Copies of complaint (4), Summons and copies (4) handed to U. S. Marshal for service.
Jan. 28,	J. S. 5
Feb. 4,	Summons returned served 1/29/63, together with copy of complaint, on the U. S. Attorney, Scranton, Pennsylvania, and by certified mail on the Attorney

Date • *Proceedings*

1963

General, Department of Justice, Washington, D. C. (MF&E $3.00.)

Mar. 25, Answer of defendant.

Apr. 11, Praecipe to place case on the Trial List for the October 1963 Term of Court at Scranton, Pa.

Oct. 8, Minute Sheet of pre-trial conference. USA orally moved for summary judgment. Plaintiff allowed 30 days to file any cross motions. Court will set date for argument thereafter. (N)

Nov. 7, Motion of defendant for summary judgment, and notice that motion will be brought on for hearing on [fol. 4] January 14, 1964, at 11:00 a.m. at Scranton, Pennsylvania, and Certificate of service thereof.

Nov. 7, Brief of defendant in support of motion for summary judgment.

1964

Jan. 29, Letter of Clerk to counsel of record fixing hearing on motion of defendant for summary judgment for Monday, March 16, 1964, at 11:00 a.m. at Scranton, Pennsylvania.

Feb. 24, Order of Court, continuing case from the October 1963 Term of Court to the March 1964 Term of Court at Scranton, Pennsylvania. (MHS) Copies mailed to counsel of record.

Mar. 12, Motion of plaintiff for summary judgment, and Notice that said motion will be brought on for hearing 3-16-64 at 11:00 a.m. at Scranton, Pa.

Mar. 16, Minute Sheet of Clerk re hearing on Motion of plaintiff and defendant for summary judgment. Motion argued. Defendant allowed 15 days to make answer. (WJN).

Date *Proceedings*

1964

Mar. 16, Brief of plaintiff.

Mar. 30, Reply Brief of defendant in support of motion for summary judgment.

Aug. 10, Letter to counsel of record. Hearing on motions for summary judgment fixed for 8-14-64 at 11:30 a.m. at Scranton.

Aug. 14, Minute Sheet of Clerk, re hearing on cross motions for summary judgment. Supplemental briefs to [fol. 5] be filed and then Court will take motions under advisement. (N) Case continued to the Oct. 1964 term at Scranton.

Sept. 28, Supplemental Brief of defendant in support of motion for summary judgment.

Sept. 30, Memorandum of Judge Nealon, and Order: Now, this 30th day of September, 1964, in accordance with the Memorandum this day filed, it is hereby Ordered and Decreed that plaintiff's motion for summary judgment is entered in favor of the plaintiff and against the defendant in the amount of $17,574.45 with interest, as provided by law. Defendant's motion for summary judgment is denied. (N) Copies of memorandum and order mailed counsel of record.

Sept. 30, J. S. 6.

Nov. 27, Notice of Appeal filed by USA. Copies of Notice of Appeal mailed to counsel of record and to the U. S. Court of Appeals.

Dec. 1, Receipt for Notice of Appeal.

Dec. 24, Order that the time to docket the appeal and file the record with the U. S. Court of Appeals for the Third Circuit from the final judgment entered in this action, is extended for a period of fifty days from January 6, 1965 to February 25, 1965. (N) Copies

Date	*Proceedings*
1964	
	of order mailed counsel of record and the U. S. Court of Appeals.
Dec. 30,	Card from U. S. Court of Appeals acknowledging order extending time for filing and docketing record.
1965	
Feb. 12,	Record on Appeal mailed to U. S. Court of Appeals.

[fol. 6]

IN THE UNITED STATES DISTRICT COURT

COMPLAINT—Filed June 28, 1963

1. The Petitioner above named is the Executor of the Will of Clarence C. Young, a resident of the County of Lackawanna, who died testate on May 3, 1958 (a copy of the Will is herewith attached, made a part hereof, and marked Exhibit A), leaving to survive him a widow and four children, two of whom were sui juris.

2. This action arises under the Internal Revenue laws of the Defendant, the United States of America, and is for the recovery of taxes and penalties erroneously and illegally assessed and collected without authority from the Plaintiff, the Northeastern Pennsylvania National Bank & Trust Company, together with interest thereon. The deceased, Clarence C. Young, was a citizen of the United States, and at the time of his death resided within the jurisdiction of this Court.

3. Jurisdiction is conferred upon this Court by the provisions of Title 28, United States Code, Section 1346 (a)(1).

4. The Plaintiff's claim is for the recovery of $17,574.45 representing taxes, penalties and interest assessed

and collected from the Plaintiff under Title 26, Section 2056, of the Internal Revenue Code of 1954.

[fol. 7] 5. The taxes, penalties and interest involved herein resulted from the interpretation by the Defendant, through its agents, servants and employees, of Item 6 of the last Will and Testament of Clarence C. Young, Deceased, which reads as follows:

> "Item 6: I give, devise and bequeath one-half (½) of all the rest, residue and remainder of my estate, whatsoever and wheresoever the same may be both real and personal, to which I may be entitled, or which I may have power to dispose of at the time of my death, unto my Trustee hereinafter named and designated, to have and to hold the same in trust, nevertheless, as hereinafter provided.
>
> (a) I direct my Trustee to pay out of the said income and corpus of the said estate unto my wife, Beatrice O. Young, the sum of Three Hundred Dollars ($300.00) per month for and during the period until my youngest child reaches the age of eighteen years, and thereafter I direct my Trustee to pay to my wife, Beatrice O. Young, the sum of Three Hundred Fifty Dollars ($350.00) per month for and during the rest of her natural life.
>
> (b) If my wife survives me, she shall have the power, exercisable by Will, to appoint to her estate, or to others, any or all of the principal remaining at the time of her death. If my wife fails to appoint the entire principal to her estate or to others as above authorized, then upon her death (or if she predeceases me, then upon my death) any principal remaining at that time shall be paid over to my children on the same terms and conditions as under Item 7 of this my Will."

[fol. 8] to the effect that the marital deduction was refused and denied the Plaintiff herein, resulting in the tax penalties and assessments hereinbefore set forth.

6. The Plaintiff avers that under the terms of Item 6 of the Last Will and Testament of Clarence C. Young his surviving spouse was given the marital deduction as the same is required and defined in Section 2056 of the Internal Revenue Code of 1954.

7. The Plaintiff avers that although Plaintiff met all the requirements of Section 2056 of the Internal Revenue Code of 1954, the Defendant unlawfully, erroneously and illegally assessed and collected from the Plaintiff the sum of $17,574.45.

8. On July 9, 1962, and simultaneously with the aforementioned payment of $17,574.45, Plaintiff filed with the District Director of Internal Revenue, Scranton, Pennsylvania, a claim for refund on Form 843 in the amount of $17,574.45, together with the statutory interest, asserting therein various alternative grounds as the basis of said claim. There is attached hereto, as Plaintiff's Exhibit B, a true and correct copy of said Claim for Refund, contents of which are incorporated herein by reference thereto.

9. On September 14, 1962, the District Director of Internal Revenue issued a Notice of Rejection of said Claim for Refund.

10. No part of the aforementioned $17,574.45 of assessment, penalties and interest thereon overpaid by the Plaintiff has been refunded to the said Plaintiff.

11. By virtue of the aforesaid, the Defendant, United States of America, became and is now indebted to the [fol. 9] Plaintiff for the full amount of $17,574.45, with interest, as provided by law.

Wherefore, the Plaintiff claims judgment against the Defendant in the sum of $17,574.45, with interest thereon, as provided by law.

Trial by jury demanded.

Alex Marcus, Donald Fendrick, Attorneys for Plaintiff.

Please Serve:

United States Attorney, Federal Building, Scranton, Pennsylvania;

Attorney General of the United States, Washington, D. C.

(Serve via Registered Mail)

EXHIBIT A TO COMPLAINT

LAST WILL AND TESTAMENT

BE IT REMEMBERED THAT I, CLARENCE C. YOUNG, of R.D. 1, Clarks Summit, in the County of Lackawanna and State of Pennsylvania, being of sound mind, memory and understanding, do make this my Last Will and Testament, hereby revoking and making void all other Wills and Testaments or writings in the nature thereof by me at any time heretofore made.

[fol. 10] ITEM 1. It is my will that all my just debts and funeral expenses be fully paid by my Executor hereinafter named, and that my said Executor provide, at the expense of my estate, and erect a suitable monument to perpetuate my memory in the minds of my family and friends.

ITEM 2. I direct my Executor hereinafter named to pay all inheritance, succession or transfer taxes, and all estate duties, which shall become payable by reason of my death out of the corpus of my estate.

ITEM 3. I give, devise and bequeath unto my wife, Beatrice O. Young, all my furniture, furnishings and fixtures, household goods and personal effects.

ITEM 4. I authorize and empower my Executor hereinafter named, whenever in the settlement of my estate it shall deem it advisable, to sell at public or private sale

all of my real estate, and to execute good and sufficient deeds or other instruments in transfer, and no purchaser at any such sale shall be bound to see to the application of the purchase money.

ITEM 5. I have entered into an agreement with my sons, Richard Young and George Young, for the purchase of all my capital stock in the C. C. Young Insurance Agency, Inc., of Scranton, Pennsylvania. In the event that I have not sold my capital stock in the said corporation to my sons as provided in the agreement entered into with my sons, Richard and George, during my lifetime, I direct and authorize my Executor hereinafter named to sell and transfer my said capital stock in the C. C. Young Insurance Agency, Inc., to my sons, Richard Young and George [fol. 11] Young, immediately after my decease in accordance with the terms and conditions of the said agreement entered into with them.

ITEM 6. I give, devise and bequeath one-half (½) of all the rest, residue and remainder or my estate, whatsoever and wheresoever the same may be, both real and personal, to which I may be entitled, or which I may have power to dispose of at the time of my death, unto my Trustee hereinafter named and designated, to have and to hold the same in trust, nevertheless, as hereinafter provided.

(a) I direct my Trustee to pay out of the said income and corpus of the said estate unto my wife, Beatrice O. Young, the sum of Three Hundred Dollars ($300.00) per month for and during the period until my youngest child reaches the age of eighteen years, and thereafter I direct my Trustee to pay to my wife, Beatrice O. Young, the sum of Three Hundred Fifty Dollars ($350.00) per month for and during the rest of her natural life.

(b) If my wife survives me, she shall have the power, exercisable by Will, to appoint to her estate,

or to others, any or all of the principal remaining at the time of her death. If my wife fails to appoint the entire principal to her estate or to others as above authorized, then upon her death (or if she predeceases me, then upon my death) any principal remaining at that time shall be paid over to my children on the same terms and conditions as under Item 7 of this my Will.

ITEM 7. I give, devise and bequeath the remaining one-half (½) of all the rest, residue and remainder of [fol. 12] my estate, whatsoever and wheresoever the same may be, both real and personal, to my children in equal shares, but in case either of them, or any of them, shall die in my lifetime leaving issue living at my death, such issue shall take by representation and per stirpes between them the share which his or her parent would have taken had such parent survived me.

ITEM 8. In the event that any of my children or their issue who will otherwise be entitled under the provisions of this my Last Will and Testament to share in any manner in my estate shall not at my death have attained his or her twenty-first (21) birthday, then I give, devise and bequeath any and all shares to which said person will be entitled unto The First National Bank & Trust Co. of Scranton, herein called my Trustee, in trust, to collect and receive such share, herein called the Trust Fund; to pay the net income thereof, and if the same is not sufficient, from the corpus of the said Trust Fund, a sum of not less than Fifty Dollars ($50.00) per month for the maintenance and support of said child until he or she reaches the age of twenty-one (21) years, and when such person shall have attained his or her twenty-first (21st) birthday, to pay over and transfer to him or her absolutely the corpus or capital of his or her share. In the event that such person shall die without having attained his or her twenty-first (21st) birthday, then in that event I direct my Trustee to transfer and pay over the said corpus or capital to the per-

son or persons who would, under the laws of the State of Pennsylvania, be entitled to his personal estate in case of his intestacy.

ITEM 9. I herewith direct my Trustee herein named, if any of my children during their minority shall attend [fol. 13] College or any graduate school, to pay for and on behalf of the education, maintenance and support of the said child so attending college or any graduate school, in addition to payments for support as provided for in Item 8, a sum not exceeding One Thousand Dollars ($1,000.00) during the entire school year the said sum or sums to be taken from income as well as corpus of the said Trust Fund whenever the same may be necessary, the same to be considered as an advancement and to be deducted from the respective child's share.

ITEM 10. In the event that any of my children shall have died in my lifetime without leaving issue, then his share shall be divided equally among the other children in equal shares, share and share alike, the shares to be distributed in accordance with the terms and conditions herein contained.

ITEM 11. The income and payments herein provided for my wife and children and the issue of my children are for their, and each of their, sole and separate use, maintenance and support, and are in no event to be liable for any debts contracted by them or any of them, and are not to be liable to attachment or assignment, but are solely and exclusively for their and each of their sole and individual use, maintenance and support, and none of the income and payments shall vest in the said cestuis que trustent, or either of them, until payments shall have been made to ~~her~~ or to him, as the case may be.

ITEM 12. In the event of a serious illness or a financial emergency affecting my wife or any of my children, I herewith direct and authorize my Trustee to pay, in [fol. 14] addition to other payments hereinbefore provided

for, to my wife, or to my children, as the case may be, an amount not exceeding Fifteen Hundred Dollars ($1500.00), the said amount to be determined by my Trustee, as in its discretion the same may be necessary, during such illness or financial difficulty. The said payments to any child or children to be considered as an advancement and to be deducted from the respective share of said child or children.

ITEM 13. I nominate, constitute and appoint The First National Bank & Trust Co. of Scranton to be Executor and Trustee of this my Last Will and Testament.

ITEM 14. I hereby direct my Executor and Trustee hereinbefore named to engage Alex Marcus, Esq., as its attorney in the administration of my estate, as well as my Trust Estate.

IN WITNESS WHEREOF, I, CLARENCE C. YOUNG, the Testator, have to this my Last Will and Testament set my hand and seal this 8th day of January, 1957.

(s) Clarence C. Young, (Seal)

Signed, sealed, published and declared by the above-named Testator as and for his Last Will and Testament, in the presence of us, who, at his request, in his presence and in the presence of each other, have subscribed our names as witnesses thereto.

Name (s) Frank M. McDonald,
Residence, 803 Connell Building,
Scranton, Pa.

Name (s) Alex Marcus,
Residence, 803 Connell Building,
Scranton, Pa.

[fol. 15]

EXHIBIT B TO COMPLAINT

U. S. Treasury Department Internal Revenue Service

CLAIM

To be filed with the District Director where assessment was made or tax paid.

District Director's Stamp (Date received)

RECEIVER

24 Jul. 9, 1962

Dis. Dir. Int. Rev.

Scranton, Teller #1

Form 843

(Rev. Mar. 1960)

The District Director will indicate in the block below the kind of claim filed and fill in where required.

☒ Refund of Taxes Illegally, Erroneously, or Excessively Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

Please Type or Print Plainly

Name of taxpayer or purchaser of stamps: Estate of Clarence C. Young, Northeastern Pennsylvania National Bank and Trust Company, Executor.

[fol. 16] Number and street: P. O. Box No. 831.

City, town, postal zone, State: Scranton, Penna.

Fill in applicable items—Attach letter size sheets if space is not sufficient.

1. Social security number:

2. If an employer, enter employer identification number:

3. District in which return if any was filed: Scranton, Penna.

4. Name and address shown on return if different from above:

5. Period—if for tax reported on annual basis, prepare separate form for each taxable year: Date of death, May 3, 1958.

6. Kind of tax: Estate Tax.

7. Amount of assessment: $14,966.23.

Dates of payment: July 9, 1962.

8. Date stamps were purchased from Government:

9. Amount to be refunded: $14,966.23.

10. Amount to be abated (not applicable to income, estate, or gift taxes):

11. The claimant believes that this claim should be allowed for the following reasons:

> The marital deduction under Section 2056 of the 1954 Internal Revenue Code as amended should be [fol. 17] allowed in full pursuant to the Estate of Gelb v. Commissioner, 298 F. 2d 544 (1962).

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Signed .....

Dated ....., 19.....

Instructions

1. The claim must set forth in detail each ground upon which it is made and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. If a joint income tax return was filed for the year for which this claim is filed, enter social security and employer identification number, if any, of both husband and wife and each must sign this claim even though only one had income.

3. Whenever it is necessary to have the claim executed by an agent on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent to sign the claim on behalf of the taxpayer shall accompany the claim.

4. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, [fol. 18] receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

5. Where the taxpayer is a corporation, the claim will be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

6. If claim is for excess social security (F.I.C.A.) tax withheld as a result of having had more than one employee, include the names and addresses of your employers, and the amount of wages received and taxes withheld by each

as part of your explanation in item 11. Do not claim tax withheld if you have claimed the excess withholding on your individual income tax return.

[fol. 19]

IN THE UNITED STATES DISTRICT COURT

ANSWER—Filed March 25, 1963

The defendant, the United States of America, by and through its attorney, Bernard J. Brown, United States Attorney in and for the Middle District of Pennsylvania, for its answer, admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the complaint.

2. Admits the allegations contained in paragraph 2 of the complaint, except denies that any taxes or penalties were erroneously and illegally assessed and collected from the plaintiff.

3. Admits that the jurisdiction of this court, if any, is conferred by the provisions of Title 28, U.S.C. Section 1346(a) (1).

4. Denies the allegations contained in paragraph 4 of the complaint, and avers instead that the plaintiffs are claiming to recover $17,574.45 in taxes and interest assessed and collected from the plaintiffs under the provisions of the Internal Revenue Code of 1954.

5. Denies the allegations contained in paragraph 5 of the complaint, and avers instead that the deficiency of $14,966.23 and interest of $2,608.22 resulted from a reduction of the marital deduction.

[fol. 20] 6. Denies the allegations contained in paragraph 6 of the complaint.

7. Denies the allegations contained in paragraph 7 of the complaint.

8. Admits the allegations contained in paragraph 8 of the complaint, and further admits that the attached Exhibit B is a true and correct copy of the claim for refund except that it lacks the signature and date, but denies each and every allegation contained in the attached Exhibit B unless specifically admitted herein.

9. Admits the allegations contained in paragraph 9 of the complaint, except avers that the notice of rejection is dated September 21, 1962.

10. Admits the allegations contained in paragraph 10 of the complaint, except denies that any assessment, penalties, taxes or interest were overpaid.

11. Denies the allegations contained in paragraph 11 of the complaint.

Wherefore, defendant prays for dismissal of plaintiffs' complaint, judgment in its favor, the costs of this action, and any other relief the Court may deem just and proper.

[fol. 21]

IN THE UNITED STATES DISTRICT COURT

MOTION FOR SUMMARY JUDGMENT—Filed November 7, 1963

The defendant pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, and based upon the pleadings and affidavit annexed hereto moves that the Court enter summary judgment in favor of the defendant for the following reasons:

1. There is no genuine issue of fact.

2. The bequest of $300 per month to the surviving spouse does not qualify as a specific portion pursuant to Section 20.2056(b)-5(c) of the Estate Tax Regulations.

3. The surviving spouse is not entitled to all of the income for life from the amount sought to be deducted.

Bernard J. Brown, United States Attorney.

[fol. 22]

IN THE UNITED STATES DISTRICT COURT

MEMORANDUM—September 30, 1964

This case is before the Court on motions for summary judgment by both plaintiff, Northeastern Pennsylvania National Bank & Trust Company, Executor under the Will of Clarence C. Young, and defendant, United States of America. The pivotal issue centers around plaintiff's entitlement to claim a marital deduction as a result of a testamentary trust.

In the instant case, Clarence C. Young, the decedent, died testate on May 3, 1958, survived by his wife and four children. In the Will, plaintiff, Northeastern Pennsylvania National Bank & Trust Company, was named Executor and Trustee of the estate. Item 6 of the decedent's last Will and Testament provided as follows:

> "Item 6. I give, devise and bequeath one-half (½) of all the rest, residue and remainder of my estate, whatsoever and wheresoever the same may be, both real and personal, to which I may be entitled, or which I may have power to dispose of at the time of my death, unto my Trustee hereinafter named and designated, to have and to hold the same in trust, nevertheless, as hereinafter provided.
>
> (a) I direct my Trustee to pay out of the said income and corpus of the said estate unto my wife Beatrice O. Young, the sum of Three Hundred Dollars ($300.00) per month for and during the period until [fol. 23] my youngest child reaches the age of eighteen years, and thereafter I direct my Trustee to pay to my wife, Beatrice O. Young. the sum of Three Hundred Fifty Dollars ($350.00) per month for and during the rest of her natural life.
>
> (b) If my wife survives me, she will have the power, exercisable by Will, to appoint to her estate or to others, any or all of the principal remaining at the

time of her death. If my wife fails to appoint the entire principal to her estate or to others as above mentioned, then upon her death (or if she predeceases me, then upon my death) any principal remaining at that time shall be paid over to my children on the same terms and conditions as under Item 7 of this my Will."

The value of the testamentary residuary trust passing under Item 6 of his Will was $69,245.85, which was listed on the estate tax return by plaintiff as qualifying for the marital deduction pursuant to Section 2056 of the Internal Revenue Code of 1954. The value of the testamentary residuary trust and the property passing outside of the Will to the surviving spouse equalled $110,496.87. The plaintiff claimed a marital deduction in the amount of $99,874.98, constituting one-half of the adjusted gross estate as shown on the return. During the examination, the parties agreed to inclusion of Five Hundred ($500.00) Dollars as the value of household and personal effects specifically devised to the surviving spouse. Subsequently, the government eliminated the full value of the testamentary residuary trust from the marital deduction and thus decreased the amount of the allowable marital deduction to $41,751.02. [fol. 24] The government contends that plaintiff (a) does not qualify for the marital deduction because the surviving spouse is not entitled to all of the income from the entire interest[1] and (b) cannot fit within the definition of a specific

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[1] Section 2056(b)-5, Internal Revenue Code of 1954, 26 U.S.C., Sec. 2056

"(5) *Life estate with power of appointment in surviving spouse.* —In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse . . ."

portion because Section 20.2056(b)-5 of the Treasury Regulations on Estate Tax requires that in order to qualify as a specific portion, the surviving spouse's rights in income must be a fractional or percentile share and not a fixed amount as is present in this case.[2] Plaintiff disputes de- [fol. 25] fendant's reasons, asserting that the Trust provision establishing a set monthly payment to the surviving spouse did not prevent the property from qualifying as passing to her as she alone received the income payments and she was given the sole right at her death to appoint the then principal under a general power of appointment and, further, assuming that the monthly payments to the surviving spouse do not constitute all the net income of the testamentary residuary trust, the plaintiff should, nevertheless, be entitled to take as a marital deduction the value of the specific portion to which the surviving spouse is entitled, as may be computed actuarially.

The marital deduction was first introduced into the estate tax law as Section 361 of The Revenue Act of 1948, 62 Stat.

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[2] Treasury Regulations on Estate Tax (1954 Code). Sec. 20.2056(b)-5. Marital Deduction; Life Estate with Power of Appointment in Surviving Spouse.

"(c) *Definition of 'specific portion.'* A partial interest in property is not treated as a specific portion of the entire interest unless the rights of the surviving spouse in income and as to the power constitute a fractional or percentile share of a property interest so that such interest or share in the surviving spouse reflects its proportionate share of the increment or decline in the whole of the property interest to which the income rights and the power relate. Thus, if the right of the spouse to income and the power extend to one-half or a specified percentage of the property, or the equivalent, the interest is considered as a specific portion. On the other hand, if the annual income of the spouse is limited to a specific sum, or if she has a power to appoint only a specific sum out of a larger fund, the interest is not a deductible interest. Even though the rights in the surviving spouse may not be expressed in terms of a definite fraction or percentage, a deduction may be allowable if it is shown that the effect of local law is to give the spouse rights which are identical to those she would have acquired if the size of the share had been expressed in terms of a definite fraction or percentage . . ."

110, which amended Section 812(e) of the Internal Revenue Code of 1939. The legislative history of the marital deduction and its revelation of Congressional intent was reviewed by Mr. Justice Goldberg in United States v. Stapf, 375 U.S. 118 (1963), as follows:

> "Our conclusion concerning the congressionally intended result under §812(e) (1) accords with the general purpose of Congress in creating the marital deduction. The 1948 tax amendments were intended to equalize the effect of the estate taxes in community [fol. 26] property and common-law jurisdictions. Under a community property system, such as that in Texas, the spouse receives outright ownership of one-half of the community property and only the other one-half is included in the decedent's estate. To equalize the incidence of progressively scaled estate taxes and to adhere to the patterns of state law, the marital deduction permits a deceased spouse, subject to certain requirements, to transfer free of taxes one-half of the non-community property to the surviving spouse. Although applicable to separately held property in a community property state, the primary thrust of this is to extend to taxpayers in common-law States the advantages of 'estate splitting' otherwise available only in community property States. The purpose, however, is only to permit a married couple's property to be taxed in two stages and not to allow a tax-exempt transfer of wealth into succeeding generations. Thus the marital deduction is generally restricted to the transfer of property interests that will be includible in the surviving spouse's gross estate."

The Act of 1948 also provided that an interest in property passing from the decedent in trust under which the surviving spouse is entitled to all of the income for life, payable at least annually, with power in the surviving spouse to appoint the entire trust corpus, would qualify for the deduction. The Act provided further that certain

interests passing to the surviving spouse which would "terminate" upon a lapse of time or the occurrence or non-occurrence of an event or contingency would not qualify for the deduction. However, the legislation failed to provide for the situation in which the surviving spouse received an interest not in trust or received less than all of [fol. 27] the trust income or the power to appoint less than all of the trust property. To remedy this situation, Section 2056(b)-5 of the Internal Revenue Code of 1954 (see footnote 1) was enacted and provides, in part, that a life estate with power of appointment can qualify for the marital deduction to the extent that the surviving spouse is entitled for life to all of the income from a specific portion thereof with power in the surviving spouse to appoint such specific portion. While the Code itself provides no definition of the term "specific portion", Section 20.2056(b)-5(c) of the Treasury Regulations on Estate Tax (see footnote 2) defines a specific portion as a fractional or percentile share of a property interest. The government asserts that such a definition is consistent with the example of a specific portion found in the committee reports to the 1954 Code.[3] Accordingly, the government concludes that plaintiff is not entitled to claim a marital deduction either (a) as to the

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[3] The Congressional reports state (H. Rep. No. 1337, 83d Cong., 2d Sess., pp. 92, A319 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4119, 4462; S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 125, 475 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4759, 5119):

> The bill makes it clear that property in a legal life estate as well as property in trust qualifies for the marital deduction and that a right to income plus a general power of appointment over only an undivided part of the property will qualify that part of the property for the marital deduction . . .
>
> . . .
>
> For example, if the decedent in his will provided for the creation of a trust under the terms of which the income from one-half of the trust property is payable to his surviving spouse with uncontrolled power in the spouse to appoint such one-half of the trust property by will, such interest will qualify as an exemption from the terminable interest rule.

[fol. 28] value of the entire corpus under the testamentary residuary trust, inasmuch as the surviving spouse is not entitled to all of the income during her life, or (b) as to the alleged specific portion to which the surviving spouse may be entitled, as may be computed actuarially, because the surviving spouse is to receive a fixed amount of income per month and not a fractional or percentile share of income.[4]

As to argument (a), defendant contends that the Committee Reports accompanying the Revenue Act of 1948 make it clear that a trust will not qualify for the marital deduction if the income is required to be accumulated or may, in the discretion of the trustee, be accumulated.[5] In essence, the language from the Committee Reports was incorporated into Section 20.2056(b)-5 (f) (7) of the Treasury Regulations on Estate Tax. Notwithstanding the fact that the corpus has been unable up to this time to produce income of $300 per month, it would appear that plaintiff is not entitled to take as a marital deduction the value of the property passing to the decedent's surviving spouse under the testamentary residuary trust. Under the terms [fol. 29] of the decedent's Will, income from the trust could have exceeded $300 per month and the surplus would then be required to be accumulated. This would run contrary to Congressional intent as expressed in the Committee Reports and could have denied the surviving spouse the

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[4] Neither side challenges the fact that by utilizing United States Life Table 38, with interest at 3½ per cent, the present worth of the right to receive $300 per month for the life of a person aged forty-two, which was the surviving spouse's age at the time of decedent's death, is $300 x 12 x 17.3911 x 1.0159 (factor for monthly payments) or $63,663.43. Of course, the government contests the right of the plaintiff to utilize any actuarial computations.

[5] See S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 17 (1948-1 Cum. Bull. 285, 342-343): "(3) The surviving spouse must be entitled to the income from the corpus of the trust annually, or at more frequent intervals. This requirement disqualifies any trust the income of which is required to be accumulated or may, in the discretion of the trustee, be accumulated."

full enjoyment as virtual owner of the property. By way of example, a testator could create a testamentary trust with a corpus of One Million Dollars and provide income of $100 per month to the surviving spouse with no income entitlement to anyone else. Consequently, no one else would share in the income, but there would necessarily have to be an accumulation which would most certainly deny the surviving spouse of her full enjoyment as virtual owner of the property. Hence the need for a determination as to what the terms of the trust instrument could produce and not what ultimately occurs. "We cannot wait like 'Monday morning quarterbacks,' to see what actually happened but must concern ourselves to what *could* have happened . . ." Bookwalter v. Lamar, 323 F. 2d 664 (8th Cir. 1963). It must be remembered that a taxpayer seeking the benefit of a deduction must show that every condition has been fully satisfied which Congress has seen fit to impose. Deputy v. DuPont, 308 U.S. 488; New Colonial Co. v. Helvering, 292 U.S. 435. Congress has made it a condition to marital deduction entitlement for the entire corpus, that the surviving spouse be entitled to all of the income from the trust. The terms of the trust instrument provide for the payment of $300 per month, which does not require that the surviving spouse receive all of the income annually. Consequently, plaintiff is not entitled to take as a marital deduction the value of the property passing to the decedent's surviving spouse under the testamentary residuary trust.

[fol. 30] As to plaintiff's alternative position, i.e., that plaintiff should be entitled to take as a marital deduction the value of the specific portion to which the surviving spouse is entitled, as may be computed actuarially, a different result may be warranted. In other words, plaintiff asserts that the surviving spouse is absolutely entitled to $300 per month and if this amount is construed to represent income from corpus, then by actuarial computation, the amount of corpus that would yield this income can be

ascertained and should be treated as qualifying as a specific portion for marital deduction purposes.

The government makes much of the argument that Section 20.2056(b)-5(c) of the Estate Tax Regulations is consistent with the statute and must be followed. This regulation provides that in order to be treated as a specific portion, the rights of the surviving spouse in income and as to the power must constitute a fractional or percentile share and if the annual income of the spouse is limited to a specific sum, then the interest is not a deductible interest. The underlying reason for this regulation, according to the government, is that the interest or share in the surviving spouse must "reflect its proportionate share of the increment or decline in the whole of the property interest to which the income rights and the power relate." That is, that both the government and the surviving spouse share equally in the risk of the property decreasing in value (and thus the ultimate tax decreasing) and of the property increasing in value (and thus the ultimate tax increasing). This argument was rejected by the Court of Appeals for the Second Circuit in Gelb v. Commissioner of Internal Revenue, 298 F. 2d 544 (1962). In that case, the widow, under the re-
[fol. 31] siduary trust was entitled to at least $10,000.00 a year; principal to be invaded if necessary. The widow was given the power to appoint the principal by will. The trustees, the widow and her son, had the discretion to advance from the corpus, an amount not in excess of $5,000.00 a year for the support and education of the youngest daughter. The Court held that the entire trust property did not qualify for the marital deduction, but that the capitalized vaule of $5,000.00 per annum[6] could be carved out of the corpus and that the corpus, as diminished, would qualify for the marital deduction.

"The Commissioner does not argue that the divergency between the extent of Rose's (the widow) right

[6] This would be accomplished by multiplying the present value of $5,000.00 by the joint life expectancy of the widow (Rose) and the youngest daughter (Claire).

to income and her power to appoint prevents her interest from constituting a 'specific portion' . . . The Commissioner's argument is rather that here even the smaller portion, that over which the right to appoint corpus extends, does not qualify because it is not the 'fractional or percentile share' demanded by the Regulations . . . "

". . . True, when the power is to draw a specific dollar amount the spouse bears no risk of change in the value of the corpus, unless, indeed, it shrinks below the dollar figure; and when the power is over all the corpus except a named dollar amount, the spouse is saddled with a disproportionate risk. However, Congress spoke of a 'specific portion' not of a 'fractional or percentile share,' and nowhere indicated any policy that deductibility of a 'specific portion' should be gov- [fol. 32] erned by the possibility that the spouse's portion will change in value relatively more or less than the clearly nonqualifying part. Neither has the Commissioner given us any reason why this should be so. A basic purpose of the marital deduction was to reduce the discrimination against taxpayers not in community property states, S. Rep. No. 1013, 80th Cong., 2nd Sess., in 1948-1 C. B. at pp. 305-306; see Commissioner v. Estate of Ellis, (58-1 USTC 11, 746) 252 F. 2d 109, 112 (3 Cir. 1958). The liberalization in the provision as to trusts, made in the 1954 Code and applied to earlier years by the Technical Amendments Act, was evidently designated to permit certain normal testamentary dispositions without the total forfeiture of the deduction that the 1939 Code had occasioned in some instances. That Congress gave a fractional interest as an example of a 'specific portion' does not warrant a construction that Congress did not mean to include other instances fairly within the language and the underlying policy. We disapprove Regulations 105, §81.47 a(c) (3) (1954 Code—Regs. §20.2056 (b)-

5(c)) insofar as it would limit a 'specific portion' to 'a fractional or percentile share.'"

"However, the taxpayers here encounter an added difficulty. Rose's qualifying power was not over the entire corpus less a sum described in dollars, but over all less a sum which can at best be estimated by actuarial calculations. It is surely arguable that in the latter case the power is not exercisable over a 'specific portion' even though in the former it is—the joint lives of Rose and Claire might differ substantially from their actuarial expectancy. Yet the use of [fol. 33] actuarial tables for dealing with estate tax problems has been so widespread and of such long standing that we cannot assume Congress would have balked at it here; the United States is in business with enough different taxpayers so that the law of averages has ample opportunity to work."

It is true that in Gelb the surviving spouse was entitled to all the income, although her power of appointment over the corpus was reduced by the amount needed for her daughter's education. However, the principle enunciated in Gelb has similar application here where the surviving spouse's entitlement to income was confined to $300, although she retained full power of appointment over the entire corpus. The actuarial computation mentioned and approved in Gelb can be just as feasibly applied here. While I recognize that administrative interpretation is entitled to great weight, I agree with the reasoning in Gelb that the Congressional "... example of a 'specific portion' does not warrant a construction that Congress did not mean to include other instances fairly within the language and the underlying policy."

Applying the actuarial computation described in footnote 4, and adding this sum of $63,663.43 to the $41,751.02 marital deduction heretofore allowed by defendant, a total of $105,414.45 is reached, which exceeds the $99,874.98 marital deduction claimed by plaintiff in the estate tax

return. Consequently, plaintiff is entitled to the full marital deduction of $99,874.98 and judgment will be entered for $17,574.45, representing the tax unlawfully collected [fol. 34] by defendant when the specific portion of the testamentary residuary trust was erroneously disallowed.

William J. Nealon, United States District Judge.

September 30, 1964.

IN THE UNITED STATES DISTRICT COURT

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—September 30, 1964

Now, this 30th day of September, 1964, in accordance with the Memorandum this day filed, it is hereby Ordered and Decreed that plaintiff's motion for summary judgment is granted and judgment is entered in favor of the plaintiff and against the defendant in the amount of $17,574.45 with interest, as provided by law. Defendant's motion for summary judgment is denied.

William J. Nealon, United States District Judge.

[fol. 35]

IN THE UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed November 27, 1964

F.R.C.P. Rule 73(a), (b)

Notice is hereby given that the United States of America, Defendant above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the final judgment entered in this action on September 30, 1964.

Bernard J. Brown, United States Attorney, Attorney for Appellant United States of America.

Dated: November 27, 1964.

[fol. 35a]

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 15,249

NORTHEASTERN PENNSYLVANIA NATIONAL BANK & TRUST COMPANY, Executor Under the Will of CLARENCE C. YOUNG

v.

UNITED STATES OF AMERICA, Appellant.

Appellee's Appendix

[fol. 36]

Internal Revenue Code of 1954

Internal Revenue Code of 1954, Section 2056. (a) Allowance of Marital Deduction.—For the purposes of the tax imposed by Section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(b) Limitation in the Case of Life Estate or Other Terminable Interest.—

(1) General Rule.—Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate

or fail, no deduction shall be allowed under this section with respect to such interest—

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property, after such termination or failure [fol. 37] of the interest so passing to the surviving spouse; and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under subparagraphs (A) and (B)).—

(C) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust. For purposes of this paragraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

* * * * * * *

(5) Life Estate With Power of Appointment in Surviving Spouse.—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of

others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

(A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

[fol. 38] (B) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse. This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

* * * * * * *

(26 U.S.C. 1958 ed., Sect. 2056)

Treasury Regulations on Estate Tax
(1954 Code)

§20.2056(b)-1 Marital Deduction; Limitation in Case of Life Estate or Other "Terminable Interest"—

(a) In General. Section 2056(b) provides that no marital deduction is allowed with respect to certain property interests, referred to generally as "terminable interests," passing from a decedent to his surviving spouse....

(b) "Terminable Interests." A "terminable interest" in property is an interest which will terminate or fail on the lapse of time or on the occurrence or the failure to occur of some contingency. Life estates, terms for years, annuities, patents, and copyrights are therefore terminable interests.

(c) Nondeductible Terminable Interests. (1) A property interest which constitutes a terminable in-

[fol. 39] terest, as defined in paragraph (b) of this section, is nondeductible if—

(i) Another interest in the same property passed from the decedent to some other person for less than an adequate and full consideration in money or money's worth, and

(ii) By reason of its passing, the other person or his heirs or assigns may possess or enjoy any part of the property after the termination or failure of the spouse's interest.

* * * * * * *

§20.2056(b)-4 Marital Deduction; Valuation of Interest Passing to Surviving Spouse—

(d) Remainder Interests. If the income from property is made payable to another individual for life, or for a term of years, with remainder absolutely to the surviving spouse or to her estate, the marital deduction is based upon the present value of the remainder. The present value of the remainder is to be determined in accordance with the rules stated in §20.2031-7.

* * * * * * *

§20.2056(b)-5 Marital Deduction; Life Estate With Power of Appointment in Surviving Spouse—

(a) In General. Section 2056(b)(5) provides that if an interest in property passes from the decedent to his surviving spouse (whether or not in trust) and the spouse is entitled for life to all the income from the [fol. 40] entire interest or all the income from a specific portion of the entire interest, with a power in her to appoint the entire interest or the specific portion, the interest which passes to her is a deductible interest, to the extent that it satisfies all five of the conditions set forth below (see paragraph (b) of this section if one or more of the conditions is satisfied as to only a portion of the interest):

(1) The surviving spouse must be entitled for life to all of the income from the entire interest or a specific portion of the entire interest, or to a specific portion of all the income from the entire interest.

(2) The income payable to the surviving spouse must be payable annually or at more frequent intervals.

(3) The surviving spouse must have the power to appoint the entire interest or the specific portion to either herself or her estate.

(4) The power in the surviving spouse must be exercisable by her alone and (whether exercisable by will or during life) must be exercisable in all events.

(5) The entire interest or the specific portion must not be subject to a power in any other person to appoint any part to any person other than the surviving spouse.

(b) Specific Portion; Deductible Amount. If either the right to income or the power of appointment passing to the surviving spouse pertains only to a specific portion of a property interest passing from the decedent, the marital deduction is allowed only to the [fol. 41] extent that the rights in the surviving spouse meet all five conditions described in paragraph (a) of this section. While the rights over the income and the power must coexist as to the same interest in property, it is not necessary that the rights over the income or the power as to such interest be in the same proportion. However, if the rights over income meeting the required conditions set forth in paragraph (a)(1) and (2) of this section extend over a smaller share of the property interest than the share with respect to which the power of appointment requirements set forth in paragraph (a)(3) through (5) of this section are satisfied, the deductible interest is limited to the smaller share. Correspondingly, if a power of appointment

meeting all the requirements extends to a smaller portion of the property interest than the portion over which the income rights pertain, the deductible interest cannot exceed the value of the portion to which such power of appointment applies. Thus, if the decedent leaves to his surviving spouse the right to receive annually all of the income from a particular property interest and a power of appointment meeting the specifications prescribed in paragraph (a)(3) through (5) of this section as to only one-half of the property interest, then only one-half of the property interest is treated as a deductible interest. Correspondingly, if the income interest of the spouse satisfying the requirements extends to only one-fourth of the property interest and a testamentary power of appointment satisfying the requirements extends to all of the property interest, then only one-fourth of the interest in the spouse qualifies as a deductible interest. Further, if the surviving spouse has no right to income from a [fol. 42] specific portion of a property interest but a testamentary power of appointment which meets the necessary conditions over the entire interest, then none of the interest qualifies for the deduction. In addition, if, from the time of the decedent's death, the surviving spouse has a power of appointment meeting all of the required conditions over three-fourths of the entire property interest and the prescribed income rights over the entire interest, but with a power in another person to appoint one-half of the entire interest, the value of the interest in the surviving spouse over only one-half of the property interest will qualify as a deductible interest.

(c) Definition of "Specific Portion". A partial interest in property is not treated as a specific portion of the entire interest unless the rights of the surviving spouse in income and as to the power constitute a fractional or percentile share of a property interest so

that such interest or share in the surviving spouse reflects its proportionate share of the increment or decline in the whole of the property interest to which the income rights and the power relate. Thus, if the right of the spouse to income and the power extend to one-half or a specified percentage of the property, or the equivalent, the interest is considered as a specific portion. On the other hand, if the annual income of the spouse is limited to a specific sum, or if she has a power to appoint only a specific sum out of a larger fund, the interest is not a deductible interest. Even though the rights in the surviving spouse may not be expressed in terms of a definite fraction or percentage, [fol. 43] a deduction may be allowable if it is shown that the effect of local law is to give the spouse rights which are identical to those she would have acquired if the size of the share had been expressed in terms of a definite fraction or percentage.

(e) Application of Local Law. In determining whether or not the conditions set forth in paragraph (a)(1) through (5) of this section are satisfied by the instrument of transfer, regard is to be had to the applicable provisions of the law of the jurisdiction under which the interest passes and, if the transfer is in trust, the applicable provisions of the law governing the administration of the trust.

(f) Right to Income. (1) If an interest is transferred in trust, the surviving spouse is "entitled for life to all of the income from the entire interest or a specific portion of the entire interest," for the purpose of the condition set forth in paragraph (a)(1) of this section, if the effect of the trust is to give her substantially that degree of beneficial enjoyment of the trust property during her life which the principles of the law of trusts accord to a person who is unqualifiedly designated as the life beneficiary of a trust. Such degree of enjoyment is given only if it was the

decedent's intention, as manifested by the terms of the trust instrument and the surrounding circumstances, that the trust should produce for the surviving spouse during her life such an income, or that the spouse should have such use of the trust property as is consistent with the value of the trust corpus and with its preservation. The designation of the spouse as sole income beneficiary for life of the entire inter- [fol. 44] est or a specific portion of the entire interest will be sufficient to qualify the trust unless the terms of the trust and the surrounding circumstances considered as a whole evidence an intention to deprive the spouse of the requisite degree of enjoyment. In determining whether a trust evidences that intention, the treatment required or permitted with respect to individual items must be considered in relation to the entire system provided for the administration of the trust.

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(26 C.F.R. Sec. 20.2056(b)-1, 4, 5)

Last Will and Testament of Clarence C. Young

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* * * * * * *

Item 6. I give, devise and bequeath one-half (½) of all the rest, residue and remainder of my estate, whatsoever and wheresoever the same may be, both real and personal, to which I may be entitled, or which I may have the power to dispose of at the time of my death, unto my Trustee hereinafter named and designated, to have and to hold the same in trust, nevertheless, as hereinafter provided.

(a) I direct that my Trustee pay out of the said income and corpus of the said estate unto my wife, Beatrice O. Young, the sum of Three Hundred dollars ($300.00) per month for and during the period

until my youngest child reaches the age of eighteen years, and thereaffer I direct my Trustee to pay to [fol. 45] my wife, Beatrice O. Young, the sum of Three Hundred Fifty dollars ($350.00) per month for and during the rest of her natural life.

(b) If my wife survives me, she shall have the power, exercisable by Will, to appoint to her estate, or to others, any or all of the principal remaining at the time of her death. If my wife fails to appoint the entire principal to her estate or to others as above authorized, then upon her death (or if she predeceases me, then upon my death) any principal remaining at that time shall be paid over to my children on the same terms and conditions as under Item 7 of this my Will.

[fol. 46]

STIPULATION AND ORDERS EXTENDING THE TIME FOR FILING APPELLANT'S BRIEF AND APPENDIX

[fol. 48]

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 15249

NORTHEASTERN PENNSYLVANIA NATIONAL BANK & TRUST COMPANY, Executor Under the Will of CLARENCE C. YOUNG,

vs.

UNITED STATES OF AMERICA, Appellant.

(D.C. No. 7993)

Present: Kalodner, Chief Judge, and McLaughlin, Staley Hastie, Forman, Ganey, Smith and Freedman, Circuit Judges.

ORDER SETTING CASE DOWN FOR REHEARING BEFORE THE COURT EN BANC—March 2, 1966

It is Ordered that the above entitled case be and it hereby is set down for rehearing before the Court en Banc, the date to be fixed by the Clerk of this Court.

By the Court, J. Cullen Ganey, Circuit Judge.

Dated: March 2, 1966.

[fol. 49]

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 15249

NORTHEASTERN PENNSYLVANIA NATIONAL BANK & TRUST COMPANY, Executor Under the Will of CLARENCE C. YOUNG,

v.

UNITED STATES OF AMERICA, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued October 18, 1965

Reargued June 9, 1966

Before Staley, Chief Judge, and McLaughlin, Kalodner, Hastie, Forman, Ganey, Smith and Freedman, Circuit Judges.

OPINION OF THE COURT—Filed July 19, 1966

By FORMAN, *Circuit Judge.*

This is an appeal by the defendant, United States of America (hereinafter appellant) from a summary judgment entered by the United States District Court for the Middle District of Pennsylvania on the motion of plaintiff, Northeastern Pennsylvania Bank and Trust Company, [fol. 50] Executor under the will of Clarence C. Young (hereinafter appellee), in the amount of $17,574.45 with interest, and from the denial of appellant's motion for summary judgment. Appellee's suit alleged an improper rejection of a claimed marital deduction.

Decedent died testate on May 3, 1958, survived by his wife and four children. Paragraph 6 of decedent's will[1] provided for the bequest of one-half of the residue of the estate to appellee who was directed to pay out of income, and corpus if necessary, the sum of $300 per month to decedent's wife until his youngest child reached eighteen years of age, after which appellee was directed to pay decedent's wife $350 per month for the rest of her life. Paragraph 6 also provided that if decedent's wife survived him, she would have the power, exercisable by will, to appoint to her estate, or to others, any or all of the principal of the trust remaining at the time of her death. Paragraph 11[2] recited that such stipends were in no event to be liable

[1] "ITEM 6. I give, devise and bequeath one-half (½) of all the rest, residue and remainder of my estate, whatsoever and wheresoever the same may be, both real and personal, to which I may be entitled, or which I may have power to dispose of at the time of my death, unto my Trustee hereinafter named and designated, to have and to hold the same in trust, nevertheless, as hereinafter provided.

"(a) I direct my Trustee to pay out of the said income and corpus of the said estate unto my wife, Beatrice O. Young, the sum of Three Hundred Dollars ($300.00) per month for and during the period until my youngest child reaches the age of eighteen years, and thereafter I direct my Trustee to pay to my wife, Beatrice O. Young, the sum of Three Hundred Fifty Dollars ($350.00) per month for and during the rest of her natural life.

"(b) If my wife survives me, she shall have the power, exercisable by Will, to appoint to her estate, or to others, any or all of the principal remaining at the time of her death. If my wife fails to appoint the entire principal to her estate or to others as above authorized, then upon her death (or if she predeceases me, then upon my death) any principal remaining at that time shall be paid over to my children on the same terms and conditions as under Item 7 of this my Will."

[2] "ITEM 11. The income and payments herein provided for my wife and children and the issue of my children are for their, and each of their, sole and separate use, maintenance and support, and are in no event to be liable for any debts contracted by them or any of them, and are not to be liable to attachment or assignment,

[fol. 51] for any debts contracted by the survivor and were not to be liable to attachment or assignment, but were solely for the use, maintenance and support of the survivor.[3] Paragraph 11 also indicated that income produced from the corpus of the trust which exceeds the monthly allotment is to be accumulated. Paragraph 12[4] of the will granted appellee the power to authorize payments over and above the monthly stipend up to $1500 in the event of a serious illness or financial emergency affecting the surviving spouse. Whether the figure of $1500 is in the aggregate or may be paid in each event is unclear.

Decedent's adjusted gross estate was $199,749.96. Appellee sought to qualify the maximum amount, one-half of that adjusted gross estate, $99,874.98, as a marital deduction in accordance with Sections 2056(c)(1)[5] and 2056(b)(5)[6] of the 1954 Internal Revenue Code. The value of the property passing outside the will, to the decedent's spouse, $41,751.02, was combined on the estate tax return with the full value of the testamentary residuary trust,

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but are solely and exclusively for their and each of their sole and individual use, maintenance and support, and none of the income and payments shall vest in the said cestuis que trustent, or either of them, until payments shall have been made to her or to him, as the case may be."

[3] Whether such limitations are valid has no bearing here as we are only interested in them as they reflect the decedent's intent.

[4] "ITEM 12. In the event of a serious illness or a financial emergency affecting my wife or any of my children, I herewith direct and authorize my Trustee to pay, in addition to other payments hereinbefore provided for, to my wife, or to my children, as the case may be, an amount not exceeding Fifteen Hundred Dollars ($1500.00), the said amount to be determined by my Trustee, as in its discretion the same may be necessary, during such illness or financial difficulty. The said payments to any child or children to be considered as an advancement and to be deducted from the respective share of said child or children."

[5] 26 U.S.C. § 2056(c)(1) (1965).

[6] 26 U.S.C. § 2056(b)(5) (1965).

$69,245.85, to total $110,996.87. That portion of $110,996.87 which constituted one-half of the adjusted gross estate, $99,874.98, was listed, as noted above, as qualifying for the marital deduction. Appellant eliminated the full value of the testamentary residuary trust from the claimed marital deduction and thus decreased the amount of the allowable marital deduction to $41,751.02. The deficiency in estate tax was paid, a claim for refund was disallowed, appellee filed suit for refund, and after motions for [fol. 52] summary judgment were presented by both parties, the District Court ruled in favor of the appellee and granted the refund.[7]

The District Court did not, as proposed by appellee, conclude that the entire value of the trust corpus, $69,245.85, could be considered for the marital deduction. Instead, it applied a Treasury Department actuarial formula to value the present worth of the surviving spouse's monthly stipend. This formula produced a value of $63,663.43. This was added to $41,751.02, the value of the property passed to the surviving spouse outside the will, to total $105,414.45, an amount in excess of one-half of the decedent's adjusted gross estate, $99,874.98, the maximum allowable statutory marital deduction. The District Court thus concluded that appellee was entitled to the full marital deduction of $99,874.98, and judgment was entered for $17,574.45 plus interest, representing the tax found to have been unlawfully collected by appellant.

—I—

As the marital deduction provisions function today, under a trust arrangement such as the one involved herein, the entire corpus of the trust qualifies for inclusion in the estate tax return as part of the marital deduction if each of two prerequisites[8] are met: (1) the surviving spouse is

[7] Northeastern Pennsylvania Nat. B. & T. Co. v. United States, 235 F. Supp. 941 (M.D.Pa. 1964).

[8] There are other contingencies not relevant to the problem at hand.

entitled to all the income produced from the corpus for the remainder of the survivor's life with (2) power in the survivor to appoint the entire corpus remaining at the time of the power's exercise. If the survivor's requisite relationship to the corpus bars the qualification of the entire corpus for the deduction, a part of the trust corpus will qualify for marital deduction status if the survivor is entitled to the income from a "specific portion" of the whole, whether there be a power to appoint the entire [fol. 53] interest remaining at the time of the power's exercise or the power to appoint only a part thereof.[9] Appellant's administrative regulation[10] has defined "specific portion" as a fractional or percentile part of the entire corpus. The practical effect of the marital deduction is to defer taxation of some part of the decedent's estate passing to the surviving spouse until the death of the surviving spouse.

Reviewing the purpose of the marital deduction, Mr. Justice Goldberg speaking for a unanimous court in *United States* v. *Stapf*[11] explained:

> "The 1948 tax amendments were intended to equalize the effect of the estate taxes in community property and common-law jurisdictions.[12] [Footnote omitted.] Under a community property system, such as that in Texas, the spouse receives outright ownership of one-half of the community property and only the other one-

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[9] Consistent with this, only a part of the corpus will qualify for marital deduction status if the survivor is entitled to all the income from the corpus for life but may only appoint a "specific portion" of the remainder of the corpus at the time of the power's exercise. Similarly, only a part of the corpus, the smaller of the two specific portions, will qualify for marital deduction status if only a "specfic portion" of the income may go to the survivor for life and if the survivor's power of appointment is limited to a "specific portion" of the remaining corpus at the time of the power's exercise. See 26 C.F.R. § 20.2056(b)-5(b)(1961).

[10] 26 C.F.R. § 20.2056(b)-5(b)(1961).

[11] 375 U.S. 118, 128 (text and n.12) (1963).

half is included in the decedent's estate. To equalize the incidence of progressively scaled estate taxes and to adhere to the patterns of state law, the marital deduction permits a deceased spouse, subject to certain requirements, to transfer free of taxes one-half of the non-community property to the surviving spouse. Although applicable to separately held property in a community property state, the primary thrust of this is to extend to taxpayers in common-law states the advantages of 'estate splitting' otherwise available only in community property States."

[fol. 54] Problems that have arisen in this area have in the main concerned the extent to which the advantages of estate-splitting are to be allowed. Towards clarification of this issue, the above noted interpretive regulation was promulgated. A detailed discussion of the congressional intent behind the passage of the 1948 Revenue Act appears in Senate Report No. 1013, March 16, 1948 [to accompany H.R. 4790]. In that Report, the marital deduction additions to the 1949 Code are characterized as follows:

"These provisions have the effect of allowing a marital deduction with respect to the value of property transferred in trust or at the direction of the decedent *where the surviving spouse,* by reason of her right to the income and a power of appointment, *is the virtual owner of the property.*" [12]

And, as above detailed, the virtual ownership interest encompasses that existent in a "specific portion" of the trust corpus.

In sum, the propriety of granting a marital deduction in this case must be measured by the purpose of the marital deduction as expressed in *Stapf,* the interpretive regulation

[12] 2 U.S. Code Cong. and Ad. News, 80th Cong., 2nd Session, p. 1238 (1948) (Emphasis added.)

as promulgated by the Internal Revenue Service, the expression of the congressional intent on the subject, and the decedent's intent in structuring the existent trust arrangement.

—II—

As the survivor has been given in Paragraph 6 the right to appoint the entire corpus, no question arises in this case concerning the "specific portion" of the corpus to which the power extends. The contentions concern solely the relationship between the survivor's monthly stipend and the trust corpus—whether the decedent's trust arrangement placed in his surviving spouse the right to all the income from the corpus, or all the income from a "specific portion" [fol. 55] thereof? The appellee has offered alternative arguments, as it did before the District Court, to justify either the inclusion of the entire $69,245.85 residuary trust in the estate tax return as appropriate for marital deduction status or the inclusion of $63,663.43 in the return as a "specific portion" of the residuary trust thus qualifying for marital deduction status.

The District Court rejected, properly we believe, appellee's contention that the entirety of the trust corpus of $69,245.85 be entitled to marital deduction status. It was pointed out that appellee's position fails for, in deciding whether the survivor is entitled to receive all the income from the trust corpus for life, the determinative factor is what income the trust corpus *could* produce and not what is *now* being produced, or what ultimately *will* be produced. Here, the corpus may be able to produce more than the survivor's monthly stipend. The surplus would have to be accumulated and the survivor would have no right to the *present enjoyment* of the excess income, even though, as argued by appellee, she would have the power to appoint it. Thus, the survivor would not be entitled to the entire income which might come from the corpus, within the intendment of Section 2056(b)(5) of the 1954 Internal Revenue

Act.[13] This very real consideration must also be given appropriate weight in determining whether the survivor is entitled to the income from a "specific portion" of the trust, and what such "specific portion" is.

Was appellee, as found by the District Court, entitled to the inclusion in its tax return of $63,663.43 from the corpus as a "specific portion" thereof—a part in which the surviving spouse had a total income interest? The method [fol. 56] of actuarial computation used by the District Court, along with the efficacy of the use of any actuarial method of computing "specific portion", is of primary concern and requires analysis. It is well to underline the statutory language which must be considered in this respect. Section 2056(b)(5) of the Code makes it clear that "specific portion" is that part of the trust corpus from which the surviving spouse is entitled to "all the income." Thus, unless the actuarial formula used by the District Court succeeds in isolating that part of the trust corpus from which the survivor is entitled to *all* the income for her lifetime, the computation is of no value. The actuarial method on which this case has been turned does not, in our view, isolate that part of the trust corpus from which the surviving spouse is entitled to all the income.

The District Court, in computing the present worth of the survivor's monthly stipend, applied a formula used by the Treasury Department in the "valuation of annuities, life estates, terms for years, remainders and reversions." This may be found in 26 C.F.R. § 20.2031-7 (1961). The formula valued the worth of the monthly stipends by multi-

[13] It should be noted in passing that it would be unrealistic to conceive of an unlimited income potential from a trust whose trustees, by law, must stay within the bounds of certain guidelines. Such a consideration may play a part in another case at another time. Here, however, appellee does not argue, nor does the record reflect, that the appellee, by law, cannot invest the corpus to produce an income in excess of the monthly stipend. Thus the potentiality of the production of an income in excess of the monthly stipend to the survivor is a real factor which has been, and must be, given its due weight by the courts.

plying together the following factors: $300 (amount of monthly payment); 12 (number of months in a year); 1.0159 (factor for monthly payments); and 17.3911 (factor for the discount rate of 3½ percent over the period of the widow's life expectancy). The present worth of the $300 monthly stipend was determined to be $63,663.43, a "specific portion" of the trust corpus, and thus qualifying for marital deduction status. The District Court thus rejected the Treasury Regulation noted above so far as it required the "specific portion" to be specified in fractional or percentile form.

As an initial matter, we find the formula inappropriate in determining what part of a trust corpus may be considered a "specific portion" for marital deduction purposes. First, the mere fact that the formula is one for valuing an annuity eliminates it as appropriate for determining "specific [fol. 57] portion." The factor 17.3911 in the formula represents the present worth of one dollar invested in an annuity at 3½ percent over the remaining life expectancy of a person forty-two years of age, the age of the surviving spouse at the decedent's death. The formula thus provides a discount value through a process of capitalizing at 3½ percent what was directed to be $300 monthly payments. If $63,663.43 is invested at age forty-two, that amount will provide the annuitant the required monthly payments for her entire life. At death the entire fund will have been dissipated. However, the factor of fund dissolution has in no way been contemplated by the decedent. The formula thus intrudes an artificial element into our problem, an element inconsistent with what the District Court in effect conceded to be the income production potential of the corpus when it ruled that appellee was not entitled to a marital deduction for the full value of the trust corpus.

Second, the monthly stipend allotted under the trust arrangement, $300 initially, is placed into the formula as the amount of *income* which a given fund must produce. However, under the trust arrangement, the trustees have not been directed to invest the corpus so that it will yield

a given monthly income. All that has been directed is that the survivor receive such income, *even if corpus must be invaded* to make up the difference between the income yield of the corpus per month and the stipend allotment. And if the income yield be greater than $300 in a given month, the excess is to be accumulated. Thus, inclusion of the $300 figure in the formula is inappropriate for it equates the monthly stipend with the income yield from the corpus, elements which are in no way interchangeable.

Third, and this has a direct bearing on the point just made, the formula may be characterized as one which attempts to capitalize a given monthly stipend and produce a capital value, $63,663.43, which is to be the "specific portion" for marital deduction purposes. Such a method of computation is improper for we already know what is [fol. 58] the value of the entire trust. Only from that given value of $69,245.85 may any computation of "specific portion", if any be appropriate, proceed. Under the formula used by the District Court, the results that may be reached demonstrate the inappropriateness of a capitalization method which disregards the present value of the trust corpus. Assume for a moment a direction that appellee pay $350 monthly as a stipend to the surviving spouse as of the date of decedent's death. Capitalizing a $350 monthly stipend under the District Court's formula for determining "specific portion", the capital value figure reached is $74,199.80, a sum in excess of the value of the entire trust corpus. As stated above it is conceded that the estate is not entitled to a marital deduction for the sum of the entire trust corpus, because of the potentialities of income production. Yet, under the actuarial formula used to determine "specific portion", the formula accepted by the District Court, at least the entire value of the corpus is to qualify for the deduction as a "specific portion" of the entirety, and theoretically a sum in excess of the entire trust corpus's value will qualify. The incongruity of equating the monthly stipend with the income yield is manifest.

Finally, in determining the "specific portion" of a given trust corpus from which part the survivor has an absolute income right, actuarial computation is inappropriate when the formula uses variable factors other than mere life expectancy. The use of the monthly stipend as the income factor in the formula noted above exemplifies the attempt to make constant that which is variable in this case. The 3½ percent investment factor in the actuarial formula is likewise unreal. As previously indicated, Congress's intent was to give a marital deduction to those interests of a surviving spouse in a common law jurisdiction which were akin to the fee simple interest held by a survivor in a community property state. Such an interest, to qualify as akin to a fee simple interest, must be subject to the rise and fall of the market. An investment constant, such as [fol. 59] 3½ percent in the instant case, though accepted in actuarial formulas, has no place in a problem where the very real income variations turn the issue of the allowance of the marital deduction. Indeed, the use of such a constant is absent from the regulations dealing with the "specific portion" issue, whereas it may be found in the regulations in formulas geared to different problems.

Having attempted to demonstrate the inappropriateness of the formula used by the District Court, the question arises as to whether, under the facts of this case, there does exist a method for isolating a "specific portion" of the trust corpus to qualify for marital deduction status? The term "specific portion" has been appropriately defined in this manner:

> "Presumably, specific portion does not mean anything more than a designation of the amount of the surviving spouse's interest *which makes it feasible to compute the amount of the marital deduction.*" [14]

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[14] Lowndes and Kramer, Federal Estate and Gift Taxes 407 (1956). (Emphasis added.)

Feasible computation of a "specific portion" is the key to marital deduction status.

The Internal Revenue Service in its above noted regulation considers any testamentary trust which describes the relationship between the income to be received by the survivor and the trust corpus in anything but "fractional or percentile" terms as one which expresses a relationship falling outside the susceptibility of computation, and thus one which thwarts a determination of "specific portion" for purposes of the marital deduction. *Gelb* v. *C.I.R.*,[15] heavily relied upon by appellee and the District Court, expressed a view which is contrary to the interpretive regulation. In *Gelb* the surviving spouse was entitled to *all* the income from the trust corpus for her life. As distinguished from the case at hand, the issue in *Gelb* was [fol. 60] whether the survivor had a power of appointment over a "specific portion" of the trust corpus. That problem arose because the trustees in *Gelb* were empowered to invade the corpus, in their discretion, to the extent of $5,000 per year for the support, education and maintenance of the decedent's minor daughter. The Government argued that the relationship between the extent of the invasion of corpus for purposes of supporting, educating, and maintaining the decedent's minor child, and the entirety of the corpus, was not expressed in "fractional or percentile" form and thus there was no "specific portion" for marital deduction purposes. The Second Circuit reviewed the use of actuarial formulas at some length and then finding for the taxpayer, remanded the case to the Tax Court to determine how much of the trust corpus qualified for the marital deduction under the actuarial principles which had been discussed. Though there was no mention of what particular formula should be applied, in either the Second Circuit's opinion or the stipulation of dismissal by the parties on the remand indicating the lump sum of the taxpayer's

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[15] 298 F.2d 544, 551 (2 Cir. 1962).

overpayment,[16] *Gelb* can easily be read to be consistent with the result for which the appellant contends in the instant case. Under the facts of *Gelb* only the life expectancies were subject to variation. By applying the $5,000 figure, the *maximum* extent to which the trustees could invade the trust corpus annually, together with the combined average figure of the surviving spouse's and minor child's life expectancies, the lump sum amount to be carved out of the trust corpus could be acceptably *maximized* by the computation. The remainder would be that part of the trust corpus, the "specific portion", to which the estate would be entitled to a marital deduction, a part of the corpus which in no reasonable event could be invaded for interests other than those of the surviving spouse.

The *Gelb* principles and disapproval of the Government's regulation are appropriate to the facts of *that* case. [fol. 61] But there is no need to take a position concerning the validity of that interpretive regulation, as it applies to this case. Suffice it to say, even assuming its invalidity, we have been unable to conceive of a method to compute the "specific portion" of the trust corpus to which the surviving spouse is entitled to all the income for her life. There are too many variables here. The market conditions for purposes of investment are unknown. If they are poor, a greater invasion of corpus to meet the monthly stipend will be necessary, causing a concomitant diminution of income. If market conditions are good corpus may not have to be invaded, and income accumulations may indeed accrue. Furthermore, the extent to which the appellee may, under Paragraph 12 of the will, choose to invade corpus for illness and financial emergencies is an unknown factor of considerable moment in any computation of "specific portion". Thus, in this case, the factual constants do not exist upon which the maximum income can be theoretically computed, as it was possible to theoretically compute the maximum invasion of corpus in *Gelb*. In

[16] See U.S. Tax Ct. Docket No. 71095, stipulation entered July 26, 1962.

short, the ratio between the maximum monthly income and the monthly stipend—the fraction of the entire corpus which would be the "specific portion" for marital deduction purposes—may not be acceptably computed.[17]

[fol. 62] In essence then, neither the District Court's formula, nor any other method of calculation of which we can conceive, when applied to the facts of this case, provides a method to handle the problem of maximizing the investment potential of the trust corpus. Because the marital deduction is to be allowed only when the trust beneficiary has been given an interest akin to a fee simple, what *might* ultimately happen to the invested corpus is the central consideration in determining marital deduction qualification, and the ability to maximize future investment potential is crucial to qualification, absent a fractional or percentile expression of the right to income from the trust corpus. Thus, even if done with precision, the time of the decedent's death is the inappropriate time at which to freeze the income production status of the invested corpus for purposes of qualifying a "specific portion" for the marital deduction.

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[17] An illustration of an acceptable computation, given factual constants such as inhere in *Gelb*, is the following: If the investment factors involved were constant and it could be determined that the *maximum* income that could be produced from the corpus in a month was, for example, $500, then the relationship between the $300 monthly stipend and the $500 maximum income would define "specific portion" for marital deduction purposes, *i.e.*:

> $300 being 3/5 of $500 then 3/5 of $69,245.85 would be the "specific portion" of the trust corpus from which the surviving spouse would be entitled to the entire income of $300 monthly *under maximum production circumstances.*

Though in reality it might take the entire corpus to produce the monthly stipend, or even the necessity to invade corpus might be present, nevertheless, in line with *Gelb*, it could be said, after computing the theoretical maximum income, that the surviving spouse's income interest of $300 monthly represented the investment of 3/5 of the corpus. "Specific portion" would then be accurately defined for marital deduction purposes. Let it be re-emphasized, however, that the necessary constants are absent in the instant case upon which a computation may be based.

We have reached the above conclusion with an awareness that a three-judge panel of the Seventh Circuit has most recently expressed contrary views, one judge dissenting.[18] We think the observation of the dissenter, however, in characterizing the impact of the formula used in that case —"something judicially rationalized as approximately equivalent is not enough" [19]—is most appropriate. In our view, therefore, appellant's position is sustained.[20]

Sustaining the appellant's position is consistent with both the decedent's intent as expressed in his will and the purpose behind the marital deduction provision. The decedent's intent emerges rather clearly from Paragraph 11 of his will. In reciting that the monthly stipends were to be used exclusively for the survivor's sole and individual use, maintenance, and support, sums which he endeavored to make neither liable for any debts contracted by her, nor [fol. 63] subject to her assignment, the decedent evidenced a desire to limit the survivor's control over the monthly stipend. By also limiting the amount of these stipends to a sum which could fall below the income production of the corpus, the decedent evidenced an intent to give to his surviving spouse only that which he thought would be proper for her support and maintenance. Such an interest falls short of expressing a desire to place in the hands of his survivor an interest akin to a fee simple, the only interest which Congress viewed as meeting the standards of marital deduction status.

The judgment of the United States District Court for the Middle District of Pennsylvania will be reversed and

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[18] Citizens Nat'l Bank of Evansville, Exr. v. U.S., 2 Fed. Est. & Gift Tax Rep. § 12,394 at 8167-71 (April 11, 1966).

[19] *Id.* at 8171.

[20] For a like result under somewhat different facts see Flesher v. United States, 238 F. Supp. 119, 124 (N.D.W.Va. 1965). See 4 Mertens, Law of Federal Gift & Estate Taxation 145 (July 1965 Monthly Supp.).

the case remanded for entry of summary judgment in favor of appellant.

By GANEY, *Circuit Judge, dissenting.*

Clarence C. Young died on May 3, 1958. Surviving him were his widow, who was 42 years old at the time, and four children, whose ages are not disclosed by the record. He left a last will and testament in which the plaintiff was named executor and trustee of the estate. Item 6 thereof provided as follows:

> "ITEM 6. I give, devise and bequeath one-half (½) of all the rest, residue and remainder of my estate, whatsoever and wheresoever the same may be, both real and personal, to which I may be entitled, or which I may have power to dispose of at the time of my death, unto my Trustee, hereinafter named and designated, to have and to hold the same in trust, nevertheless, as hereinafter provided.
>
> "(a) I direct my Trustee to pay out of the said income and corpus of the said estate unto my wife, Beatrice O. Young, the sum of Three Hundred Dollars ($300.00) per month for and during the period until [fol. 64] my youngest child reaches the age of eighteen years and thereafter I direct my Trustee to pay to my wife, Beatrice O. Young, the sum of Three Hundred Fifty Dollars ($350.00) per month for and during the rest of her natural life.
>
> "(b) If my wife survives me, she shall have the power, exercisable by Will, to appoint to her estate or to others, any or all of the principal remaining at the time of her death. If my wife fails to appoint the entire principal to her estate or to others as above mentioned, then upon her death (or if she predeceases me, then upon my death) any principal remaining at that time shall be paid over to my children on the same terms and conditions as under Item 7 of this my Will."

It is to be noted that the surviving widow is to have the income from all of the trust estate, as well as the power of appointment over the same by her last will and testament as to all or any part thereof. At the time of the decedent's death, the value of the testamentary residuary trust passing under the will, to which all parties were in agreement, was $69,245.85. The widow also received outright from the decedent's estate at the time of his death, property and money valued at $41,751.02. One-half of the decedent's adjusted gross estate amounted to $99,874.98 and the executor of the estate reported this value as a marital deduction in the Federal estate tax return and took therein as a partial deduction the $41,751.02.

Section 2056(b)(5) of the Internal Revenue Code of 1954, 26 U.S.C. §2056,[1] remedied previous legislation which [fol. 65] failed to provide for a situation in which the surviving spouse received an interest less than all of the trust income or the power to appoint less than all of the trust property, to the extent that, where the surviving spouse is entitled for life to all of the income from a "specific portion" thereof with power in the surviving spouse to appoint such "specific portion", it will qualify for the marital deduction. The phrase "specific portion" is nowhere defined in the statute, but Treasury Regulations on Estate

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[1] This section reads as follows:

"(5) *Life estate with power of appointment in surviving spouse.*—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, *or all the income from a specific portion* thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse. . . ." (Emphasis supplied.)

Tax (1954 Code), Sec. 20.2056(b)-5[2] so does, and therein it provides as set forth below that the surviving spouse's right to income must be a fractional or percentile share of the trust corpus.

The Commissioner of Internal Revenue disallowed any part of the $69,245.85, the value of the trust corpus to be included in the marital deduction and allowed only the $41,751.02, and assessed a deficiency estate tax of $14,966.23 plus interest at $2,608.22 against the estate. The executor paid the deficiency tax plus interest and brought this action in the United States District Court for the Middle District of Pennsylvania to recover those amounts. Both parties moved for summary judgment and the court below decided in favor of the executor in 235 F. Supp. 941, and the United States has prosecuted this appeal.

[fol. 66] It is the Government's contention here that (1) since the surviving spouse is not entitled to all the income from the entire corpus during her lifetime, because under

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[2] This section, in pertinent part, reads as follows:

"Marital Deduction; Life Estate with Power of Appointment in Surviving Spouse.

"(c) *Definition of 'specific portion'.* A partial interest in property is not treated as a specific portion of the entire interest unless the rights of the surviving spouse in income and as to the power constitute a fractional or percentile share of a property interest so that such interest or share in the surviving spouse reflects its proportionate share of the increment or decline in the whole of the property interest to which the income rights and the power relate. Thus, if the right of the spouse to income and the power extend to one-half or a specified percentage of the property, or the equivalent, the interest is considered as a specific portion. On the other hand, if the annual income of the spouse is limited to a specific sum, or if she has a power to appoint only a specific sum out of a larger fund, the interest is not a deductible interest. Even though the rights in the surviving spouse may not be expressed in terms of a definite fraction or percentage, a deduction may be allowable if it is shown that the effect of local law is to give the spouse rights which are identical to those she would have acquired if the size of the share had been expressed in terms of a definite fraction or percentage . . . ."

the terms of the decedent's will income from the trust could have exceeded $300.00 per month and the surplus would then have to be accumulated and therefore the trust becomes disqualified.[3] Furthermore, (2) the $300.00 per month allotted as income to the widow is not in conformity with the Treasury Regulation cited above since it is not fractional or percentile and no part of it, accordingly, could qualify for the marital deduction. The court below is in agreement with the first portion of the Government's contention that the plaintiff is not entitled to take as a marital deduction the value of the property passing to the spouse under the testamentary residuary trust. However, on the other hand, the contention of the executor is that since the trust makes provision for setting up a monthly income to the surviving spouse, and she alone, under the will, was granted all of the income from the trust corpus, as well as being given power to dispose of all of her interest by appointment, the plaintiff was entitled to take as a marital deduction the value of the $300.00 per month as a "specific portion" as may be computed actuarially. Since the surviving spouse is absolutely entitled to, presently, $300.00 per month, and if this amount is construed to represent income from corpus, then the amount of the corpus which would yield this income could be ascertained and regarded as qualifying as a "specific portion" for the marital deduction. Here, the court rejects the Government's second contention and agrees with the above contention of the executor since the underlying purpose of Congress in enacting the marital deduction provision of the statute was that it might conform to the pattern of [fol. 67] state law in those states which permit transfer

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[3] See S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 17 (1948-1 Cum. Bull. 285, 342-343), U. S. Code Cong. Service 1948, p. 1239: "(3) The surviving spouse must be entitled to the income from the corpus of the trust annually, or at more frequent intervals. This requirement disqualifies any trust the income of which is required to be accumulated or may, in the discretion of the trustee, be accumulated."

free of taxes of one-half of the known community property to the surviving spouse in what has been referred to as community property states. It is, accordingly, our duty to construe the statute as liberally as we can in order to effectuate such policy.

The value of this right was computed by multiplying together the following factors: $300.00 (amount of monthly payment); 12 (number of months in a year); 1.0159 (factor for monthly payments) and 17.3911 (factor for the discount rate of 3½% over the period of the widow's life expectancy). See Sec. 20.2031-7 of the Treasury Regulations of the Estate Tax provisions of the 1954 Internal Revenue Code, 26 C.F.R. Part 20-29 (Rev'd. 1961) Sec. 20.2031-7. *Citizens National Bank of Evansville* v. *United States,* (S.D. Ind. 1965), 65-1 USTC ¶12,302, a similar case, was decided in this way. This right had a value, according to this actuarial computation, of $63,663.43. The executors contend that this was a "specific portion" of the trust corpus and that the Treasury Regulation so far as it required a fractional or percentile part of the trust was invalid as being the only and exclusive indication of Congressional intent.

With this contention of the executor, I likewise agree. While, as I have indicated, all of the value of $69,245.85 could not be taken as a marital deduction, certainly $300.00 monthly for life devised in trust for his wife had a value at the time of his death and this value could be related to, or be a specific portion of, the entire corpus, and, as determined, it amounted to $63,663.43. This figure is reached after a reasonable calculation of the present worth of $300.00 over the life expectancy of the wife. I do not take into consideration fluctuation, wide or narrow, of the value of the corpus or the income thereon, over what would be the life expectancy of the wife, since the marital deduction is taken only once, at the death of testator, and I determine then what could be its value and not what might ultimately [fol. 68] happen. "We cannot wait, like Monday morning

quarterbacks, to see what actually happened, but must concern ourselves with what could have happened." *Bookwalter* v. *Lamar*, 232 F. 2d 664, 670.

It is in conformity with this that I do not take into consideration the $350.00 stipend somewhat later to be paid to the beneficiary, as it is prospective of an exigency which might never occur, and, as has been indicated, I take the marital deduction but once and at the date of the testator's death and hence the amount of the stipend at that time. This construction does not strain the statutory intent nor does it, in any wise, work a change in the phrase, "specific portion", and is fully in accord with the mandate of the statute that anyone seeking the marital deduction must satisfy the requirements thereof, which is the requisite rule in statutory construction. *United States* v. *Olympic Radio & Television*, 349 U.S. 232, 235; *Deputy* v. *Dupont*, 208 U.S. 488, 493; *New Colonial Ice Co.* v. *Helvering*, 292 U.S. 435, 440.

The final point of the majority here is an attempt to extract, from paragraph 11 of the testator's will, an intent by him to "limit the survivors' control over the monthly stipend", thus not making it akin to a fee simple.

Paragraph 11 merely provides that the fund created for the wife is for her "sole and separate use, maintenance and support" and not "only that which he thought would be proper for her support and maintenance", as stated by the majority.

As a matter of fact, this paragraph of the will has no real bearing on the issue here presented, for if the testator had provided a percentile interest for the wife, instead of a monthly stipend, this paragraph would have been equally applicable to it, so even if expressed in a percentile interest, the majority, taking the position they do here, would thus be defeating their own argument.

Since the wife gets all of the income from the specific portion and has the power of appointment over all of it, [fol. 69] this method of determining the specific portion of the corpus by evaluating the life interest at the time of the

testator's death is, in my judgment, neither inconsistent nor irreconcilable with the statutory requirement.

Furthermore, while this formula may not be a perfect one, its components are fair and reasonable and tested by Governmental experience and, therefore, it seems but just that some value be given the stipend at the testator's death in order to qualify for the marital deduction, in conformance with the desire of Congress to give full effect to its marital deduction in order that it might level off any inequality resulting from community property states, rather than let the field lie fallow and adopt a sterile attitude of defeatism because the testator has not resorted to fractional or percentile figures.

The value of the "specific portion" being ascertained at $63,663.43 within the intendment of the statute, plus the $41,757.02 already taken as a deduction, therefore exceeds the allowable marital deduction of $99,874.02, and therefore $58,117.00 of the $63,663.43, the value of the "specific portion", should be allowed additionally.

Accordingly, I would affirm the judgment of the lower court.

Chief Judge Staley and Judge McLaughlin join in this dissent.

[fol. 70]

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 15,249

NORTHEASTERN PENNSYLVANIA NATIONAL BANK & TRUST COMPANY, Executor Under the Will of CLARENCE C. YOUNG,

vs.

UNITED STATES OF AMERICA, Appellant.

(D. C. Civil No. 7993)

On appeal from the United States District Court for the Middle District of Pennsylvania.

Present: STALEY, *Chief Judge,* and MCLAUGHLIN, KALODNER, HASTIE, FORMAN, GANEY, SMITH and FREEDMAN, *Circuit Judges.*

JUDGMENT—July 19, 1966

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court, filed September 30, 1964, be, and the same is hereby reversed and the case is remanded for entry of summary judgment in favor of appellant.

ATTEST:

Ida O. Creskoff, Clerk.

July 19, 1966

[fol. 71] Clerk's Certificate (omitted in printing).

[fol. 72]

SUPREME COURT OF THE UNITED STATES

No. 637—OCTOBER TERM, 1966

NORTHEASTERN PENNSYLVANIA NATIONAL BANK & TRUST COMPANY, etc., Petitioner,

v.

UNITED STATES.

ORDER ALLOWING CERTIORARI—December 5, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.